NO. COA06-84

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v. Bladen County
No. 05 CRS 50012

BILLY RAY DAVIS

Appeal by defendant from judgments entered 8 September 2005 by Judge B. Craig Ellis in Bladen County Superior Court. Heard in the Court of Appeals 25 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Patricia A. Duffy, for the State.

Kevin P. Bradley, for defendant-appellant.

JACKSON, Judge.

On 1 January 2005, Billy Ray Davis ("defendant") was cited for driving while impaired and driving while license revoked. On 23 May 2005, defendant pled guilty in Bladen County District Court to both charges. Defendant gave notice of appeal from the District Court's judgment and a trial *de novo* was held in Bladen County Superior Court. The case was tried at the 7 September 2005 Criminal Session of Bladen County Superior Court. Defendant was convicted of driving while impaired and driving while license revoked. He was sentenced to a term of two years imprisonment for

driving while impaired and 120 days for driving while license revoked, to run consecutively. Defendant appeals the judgment. For the reasons stated below, we find no error.

On 1 January 2005, Trooper Matt Hardee of the North Carolina State Highway Patrol was on his way to Elizabethtown, North Carolina. Shortly after 5:00 p.m., Trooper Hardee came up behind defendant's pickup truck and noticed he was driving "a lot slower than the speed limit." The speed limit was fifty-five m.p.h., and Trooper Hardee estimated defendant's speed as forty to forty-five m.p.h. Trooper Hardee noticed that defendant "crossed the fog line, the white line, a couple of times." Because it was New Year's Day and a weekend afternoon, Trooper Hardee decided to stop defendant to make sure he had not been drinking. Accordingly, he activated his blue lights and stopped defendant's vehicle. Trooper Hardee approached defendant in his vehicle, smelled alcohol on his breath and noticed that his eyes were bloodshot. Trooper Hardee asked defendant for his driver's license, but he did not have a license on him. Trooper Hardee escorted defendant to his patrol car, and noted that he was "unsteady on his feet." Defendant refused to take an AlcoSensor test, and was placed under arrest.

Defendant first argues that the trial court erred by denying his motion to suppress. However, because defendant failed to comply with the procedural requirements of North Carolina General Statutes, section 15A-977, this assignment of error is overruled.

Pursuant to part (a) of that section:

> A motion to suppress evidence in superior court made before trial *must* be in writing and

> a copy of the motion *must* be served upon the State. The motion *must* state the grounds upon which it is made. The motion *must* be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated.

N.C. Gen. Stat. § 15A-977(a) (2005) (emphases added). Furthermore, our Supreme Court has held that a defendant who seeks to suppress evidence must comply with section 15A-977. *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 513 (1980); *State v. Pearson*, 131 N.C. App. 315, 317, 507 S.E.2d 301, 302 (1998).

In the instant case, defendant made an oral motion to suppress just before the start of trial. Defendant's motion was not accompanied by any affidavit, and wholly failed to comply with section 15A-977. Defendant essentially argues that any failure to comply with the requirements of section 15A-977 were resolved when the trial court heard the motion in accordance with the State's request that defendant first present evidence to support his motion. We disagree.

In *State v. Holloway*, 311 N.C. 573, 578, 319 S.E.2d 261, 264 (1984), our Supreme Court ruled that the State's failure to object to the sufficiency of a motion to suppress at trial, or to the evidentiary hearing held on the motion, did not constitute waiver. The Supreme Court stated that:

> We have held that defendants by failing to comply with statutory requirements set forth in N.C.G.S. 15A-977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds. The State's failure to object to the form of the

> motion affects neither that waiver nor the authority statutorily vested in the trial court to deny summarily the motion to suppress when the defendant fails to comply with the procedural requirements of Article 53. The trial court could properly have denied the defendant's motion to suppress based on the defendant's procedural failures alone[.]

Id.(citing *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984); *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980)). Accordingly, because petitioner failed to comply with section 15A-977 and pursuant to *Holloway*, the denial of the motion to suppress is affirmed.

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of driving while license revoked, and committed plain error in its instructions to the jury. We disagree.

Specifically, defendant claims that the State failed to comply with North Carolina General Statutes, section 20-48(a), which allows proof of notice by United States mail to be made by the certificate of any officer or employee of the Division of Motor Vehicles ("DMV"), naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. Defendant asserts that the proof of notice provided by the State does not specify the time thereof, but refers to "the mail date of the attached order." Defendant argues that none of the eleven attached notices were orders and each had a different date. Absent evidence of knowledge of license revocation, defendant argues that the charge should have been dismissed. Furthermore, because of the deficiency in the notice, defendant argues that the court committed

plain error by instructing the jury regarding the permissive presumption permitted upon compliance with section 20-48(a).

After careful review of the record, briefs, and contentions of the parties, we find no error. This Court has stated: "'To convict a defendant under N.C. Gen. Stat. § 20-28(a) of driving while his license is revoked the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked.'" *State v. Cruz*, ___ N.C. App. ___, ___, 620 S.E.2d 251, 256 (2005) (quoting *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989)). "The State must also prove 'the defendant had "actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this statute."'" *Id.* "This Court has previously held that 'the State satisfies its burden of proof of a G.S. 20-28 violation when, "nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge."'" *Id.* (quoting *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985) (quoting *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E.2d 524, 536 (1976))).

> Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at

> his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Division or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the *time, place, and manner* of the giving thereof.

N.C. Gen. Stat. § 20-48(a)(emphasis added). Thus, pursuant to section 20-48(a), "if notice of a revocation is sent via the mail, . . . there is a rebuttable presumption that defendant has received knowledge of the revocation four days after a certificate or affidavit states that a copy of an official notice has been mailed to defendant's address." *Cruz*, ___ N.C. App. at ___, 620 S.E.2d at 256–57 (citations omitted). "When mailing notice, evidence of compliance with the statute requires the State to show an official notice explaining the date revocation will begin *and* a certificate or affidavit of a person stating the 'time, place, and manner of the giving thereof.'" *Id.* at ___, 620 S.E.2d at 257 (emphasis in original).

In the instant case, the record included a DMV certificate stating that the "attached document [was] a true copy of the suspension or revocation order mailed to the within named person." It further stated that the original notice of revocation had been "deposited . . . in the United States mail on the mail date of the attached order in an envelope, postage paid, addressed as appears thereon, which address is shown by the records of the Division as the address of the person named on the document."

Attached to this certificate were eleven notices of license suspension or revocation, each concluding with a paragraph beginning, "This order is in addition to and does not supersede any prior order[.]" The final notice was dated 11 December 2003, and addressed to defendant at 4127 Roger Road in Bladenboro, North Carolina. Trooper Hardee testified that defendant stated to him that the Roger Road address was his address. The suspension was scheduled to end on 3 December 2007. Defendant was arrested for driving while license revoked on 1 January 2005. Defendant contends that the notice is insufficient because it fails to include a "time of day." However, in *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970), this Court held a similar notice, which included a date of notice, but not time of day, to meet all the requirements of section 20-48(a). *Id.* at 264, 178 S.E.2d at 121–22; *see also State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970). Thus, we conclude the notice here was sufficient, and the trial court properly denied the motion to dismiss and properly instructed the jury on the permissive presumption permitted by section 20-48(a). Accordingly, we find no error.

No Error.

Chief Judge MARTIN and Judges CALABRIA concur.

Report per Rule 30(e).